**DIRECTOR-GENERAL OF INLAND REVENUE**

**v.**

**TAY CHEE MING**

SUPREME COURT, KOTA KINABALU
GEORGE SEAH SCJ
MOHD. AZMI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 218 OF 1985]
17 OCTOBER 1986

***REVENUE LAW:*** *Resale of land - Gain made - Whether from an adventure in the nature of trade - Assessment of income tax on gain - Whether should be set aside.*

The appellant contended that when the respondent and his wife transferred their land ("the Subject Land") to Ming Huat Development Sdn. Bhd. in June 1973 they made a gain of RM479,000 from an adventure in the nature of trade, and he raised an assessment of income tax of RM268,007 on that gain. The respondent contended that it was not a gain from an adventure in the nature of trade and he appealed to the Special Commissioners. The Special Commissioners dismissed his appeal. On further appeal to the High Court, the learned Judge allowed the appeal and set aside the deciding order of the Special Commissioners. Hence this appeal.

**Held:**

**[1]** There were no facts from which inference can be drawn that the respondent acquired the subject land because of its potential value with the intention of reselling it at an enhanced price. The facts of the case do not show that the respondent spent money or took other steps to improve the subject land to enhance its value after he had acquired it.

**[2]** Although before the subject land was transferred to Ming Huat Development Sdn. Bhd. approval of a development plan had been applied for and obtained, this was not done by the respondent for himself. He as managing director made the application and obtained the approval on behalf of the company. Moreover it showed that the respondent had the intention to transfer the subject land to the company even before the application was made. These facts showed that the enhancement of value of the subject land, if any, was not the result of anything done by the respondent for the purpose of resale.

**[3]** Applying the principles enunciated in *Rutledge v. C.I.R., C.I.R. v. Livingston* and *TCS v. Director-General of Inland Revenue*, the respondent's dealing with the subject land was not an adventure in the nature of trade. Their Lordships agreed with the learned Judge that the assessment of income tax, the subject matter of this appeal, should be set aside.

*[Appeal dismissed with costs.]*

**Cases referred to:**
*Rutledge v. C.I.R. 14 TC 490*
*C.I.R. v. Livingston 11 TC 538*
*TCS v. Director-General of Inland Revenue [1971] MLJ 212*

**Legislation referred to:**
Income Tax Act 1967, ss. 2(1), 4(a), 139, 140(2)

*For the appellant - Abdul Hamid bin Haji Mohamed; Senior Federal Counsel*
*For the respondent - S. Woodhull (Mr. Thomas Chia with him); M/s. Shearn Delamore & Co.*

**JUDGMENT**

**Wan Hamzah SCJ:**

The Director-General of Inland Revenue (hereafter referred to as the Revenue) contended that when Tay Chee Ming (hereafter referred to as Tay) and his wife transferred their land held under country lease No. 30085 (hereafter referred to as the subject land) to Ming Huat Development Sdn. Bhd. on about 19 June 1973 they made a gain of RM479,000 from an adventure in the nature of trade, and he raised an assessment of income tax of RM268,007 on that gain. Tay contended that it was not a gain from an adventure in the nature of trade and he appealed to the Special Commissioners. The Special Commissioners dismissed his appeal. On further appeal to the High Court, the learned Judge allowed the appeal and set aside the deciding order of the Special Commissioners. Hence this appeal before us by the Revenue.

The facts of the case gathered from the findings by the Special Commissioners and from documentary exhibits admitted by them in evidence are set out hereunder in chronological order. We find it necessary to have regard to the time when the facts occurred.

1951 Tay took up employment with Teck Guan Co. (L.H.) Ltd.

3 August 1967 A notification was published in the Sabah Government *Gazette* giving notice under the Town and Country Planning Ordinance, of a draft scheme in the process of preparation covering long range zone Planning of Lahad Datu.

1968 Tay owned four houses in his name and another in his and his wife's name. He received rents from these houses.

4 March 1968 A document was signed on behalf of Teck Guan & Co. (L.H.) Ltd. the former owners of the subject land and by Tay, wherein it was stated that one Yong Yun had purchased the subject land and agreed to sell it to Tay for a price of RM31,000, and that the company undertook to transfer it direct to Tay as it was still registered in its name.

27 June 1968 Another notification was published in the *Gazette.* It gave notice that a draft scheme had been prepared for Lahad Datu and was available for inspection and that objections to it would be received and considered. The subject land was included in the draft scheme. Under the draft scheme the new Lahad Datu harbour was sited next door to the subject land, and this enhanced its value substantially.

2 July 1968 A company called Ming Huat Development Sdn. Bhd, was formed, consisting of eight shareholders, i.e, Tay, his wife, his three minor sons and his three brothers. Tay was the chairman and managing director and his wife a director and secretary.

3 September 1968 Tay ceased to be employed by Teck Guan Co. (L.H.) Ltd.

3 July 1969 Tay and his wife transferred to Ming Huat Development Sdn. Bhd. ten properties held under lease. The consideration for the transfer was allocation of shares in the company. The properties had been acquired by Tay and his wife after 1960. There was no finding by the Special Commissioners whether Tay made profits when he transferred these properties to the company, and Tay was not required to pay income tax in connection with the transfers of these properties.

21 January 1971 Teck Guan & Co. (L.H.) Ltd. transferred the subject land to Yong Brothers Co. (S) Sdn. Bhd.

9 October 1971 Yong Brothers Co. (S) Sdn. Bhd. transferred the subject land to Tay and his wife.

22 March 1972 Ming Huat Development Sdn. Bhd. applied to Majlis Daerah Luar Bandar, Lahad Datu, for approval of development plan for the subject land whereby it would be divided into four blocks, one block consisting of terrace shophouses, another block of terraced light industrial buildings and the other two blocks consisting of semi-detached light industrial buildings. The letter of applications was written by Tay as the managing director.

10 October 1972 Majlis Daerah Lahad Datu wrote to Ming Huat Development Sdn. Bhd. conveying approval of the development plan for the subject land.

16 February 1973 Building plan for light industrial buildings on the subject land was approved.

19 June 1973 Tay and his wife transferred the subject land to Ming Huat Development Sdn. Bhd. The consideration for the transfer was stated to be RM510,000 which was satisfied by the allotment of shares in the company to Tay, his wife, his three sons and three brothers. Subsequently Ming Huat Development Sdn. Bhd. subdivided the subject land, built houses and light industrial buildings on the subdivided lots and sold them with profits. The company paid income tax on these profits.

In the agreed statement of facts submitted to the Special Commissioners it was stated that Tay's contention was that the gain arising from the transfer of the subject land to the company was a capital gain not assessable to tax under the Income Tax Act and the Revenue's contention was that the gain arose from an adventure in the nature of trade and was assessable to tax. That was the only issue stated in the agreed statement of facts and submitted for the determination of the Special Commissioners. However, the Special Commissioners did not proceed to consider that issue. Instead they pronounced a decision which they arrived at in the consideration of an issue which they themselves stated as follows:

(a) whether the following transactions can be attributed to the appellant pursuant to s. 139 of the Income Tax Act 1967, as one transaction:

(i) the purchase and transfer of the subject land by the appellant and his wife to the company; and

(ii) the subsequent development of the subject land as a housing and industrial estate and the sale therewith by the company in the open market or by private treaty;

(b) whether the transaction if considered as a single transaction constitutes an adventure in the nature of trade.

It seems that the Special Commissioners were labouring under the misconception that s. 139 of the Income Tax Act was applicable to this case. It is clear that the purpose of s. 139 is to provide a definition of what a controlled company is which is referred to in s. 140(2). That part of s. 140(2) which refers to a controlled company deals with the income of the controlled company and has nothing to do with the income of an individual from an adventure in the nature of trade. Therefore issue (a) stated by the Special Commissioners was not a real issue

in this case. Issue (b) was also not a real issue because it was framed by the Special Commissioners with connection to issue (a). As they had not considered the real issue but misconceived issues their decision should be set aside as being inapplicable.

In this case it is not the contention of the Revenue that Tay had been trading in landed properties by repeatedly buying and selling them, but the Revenue takes Tay's dealing with the Subject Land as a single transaction of buying and selling and contends that although it was a single transaction it was a transaction of adventure in the nature of trade which means a "business" *vide* the definition of that word in s. 2(1) of the Act, and therefore the gain arising from the transfer of the Subject Land to the Company was a gain from a business chargeable to income tax under s. 4(a). The principles relating to adventure in the nature of trade were enunciated in the following cases:

*Rutledge v. C.I.R.* 14 TC 490:

The appellant was a businessman doing business of money lending and business in film and real property. He happened to be in Berlin in connection with one of those businesses, where he had the opportunity of making a purchase of a very large quantity of toilet paper from a bankrupt firm for £1,000. He had the paper sent over to Scotland and endeavoured to market it. He ultimately sold the whole quantity to one purchaser at the price of £12,000. This was a single transaction by him of buying and selling toilet paper. The Court of Session held that it was an adventure in the nature of trade and the profit was liable to assessment to income tax. Per Lord President (Clyde):

> An adventure it certainly was; for the appellant made himself liable for the purchase of this vast quantity of toilet paper obviously for no other conceivable reason than that of re-selling it at a profit; and that is just what he did. The element of adventure accordingly entered into the purchase from the first. It has been said, not without justice, that mere intention is not enough to invest a transaction with the character of trade. But, on the question whether the appellant entered into an adventure or speculation, the circumstances of the purchase, and also the purchaser's object or intention in making it, do enter, and that directly, into the solution of the question.

Per Lord Sands:

> Neither the purchaser nor any purchaser from him was likely to require such a quantity for his private use..... From beginning to end the intention was simply to buy and to re-sell..... There may be cases of purchase and re-sale at a profit where the transaction cannot be said to be in the nature of trade. In particular, this may be the case where there is no definite intention of reselling when the purchase is made. But I do not think that we can regard what was done here as other than an adventure in the nature of trade.

*C.I.R. v. Livingston* 11 TC 538:

On 10 September 1924 the respondents, a ship repairer, a blacksmith and a fish salesmen's employee, purchased as a joint venture a cargo vessel with a view to converting it into a steam-drifter and selling it. They were not connected in business and they had never previously bought a ship. Extensive repairs and alterations to the ship were carried out by the orders of the respondents, the first two of them being employed thereon in their ordinary capacity and at the ordinary trade rates, and on the 31 December 1924, the respondents sold the vessel at a profit. It was held that the respondents were assessable to income tax in respect of the profit arising on the transaction. Per Lord President (Clyde):

> I think the test which must be used to determine whether a venture such as we are now considering is, or is not, in the nature of trade, is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as in the nature of trade merely because it was a single venture which took only three months to complete ... The profit made by the venture arose, not from the mere appreciation of the capital value of an isolated purchase for resale, but from the expenditure on the subject purchased of money laid upon it for the purpose of making it marketable at a profit. That seems to me of the very essence of trade"

*TCS v. Director-General of Inland Revenue* [1971] MLJ 212:

In 1961 the appellant purchased land in Alor Star and after obtaining the permission of the Government to alter the conditions in the land title from agricultural purposes to one of erecting dwelling houses he sold it at a profit in 1973. The Special Commissioners found that in 1961 the appellant had in his mind the great development potential of the land and that it was not his intention to purchase it and keep it for his old age and in the meantime to collect rents or other income from it. The Federal Court stated the principles enunciated by Lord President (Clyde) in the cases of *Rutledge* and *Livingston* as quoted above, and held that the Special Commissioners and the learned Judge of the High Court were right in holding that the only reasonable inference from the facts and the surrounding circumstances of the case was that the acquisition of the land and the subsequent sale of it by the appellant was an adventure in the nature of trade.

In this case stated the Special Commissioners mentioned Tay's contention that all the properties including the subject land acquired by him were investments and that he had acquired them without trading motive in mind. The Special Commissioners went on to state:

> It is our finding that when he (Tay) acquired it (the subject land) on 4 March 1968 it was his stock-in-trade, in other words his intention was to develop this land as housing and light industrial estate as the facts subsequently confirmed to be so... His wife, sons and brothers were his associates pursuant to subsection (7) of the s. 139 and since the appellant (Tay) and his associates controlled the company, the rights and powers of the controlled company may be, and are attributed to the appellant. The rights and powers of the controlled company obviously include the right and power to trade in property and it therefore follows that the activities engaged in the exercise of that right and power may be, and are attributed to the appellant.

We do not agree that the activities of the company should be taken into consideration for the purpose of determining the question whether at the time of acquiring the Subject Land Tay's motive was to use it as investment or to resell it at a profit. The Special Commissioners also stated that Tay was a property dealer, but we find that the facts as found by them do not support an inference that he was a property dealer. The completed draft scheme for Lahad Datu was notified to the public in the Government *Gazette* after Tay had acquired the subject land, and therefore it cannot be said that he acquired it with the expectation of its enhanced value as the result of the scheme. Although the earlier *Gazette* notification of 3 August 1967 was published before he acquired the subject land it merely gave notice that a draft scheme was being prepared without any indication that the subject land would be included in it or that it would favourably affect the subject land. Therefore there were no facts from which inference can be drawn that Tay acquired the subject land because of its potential value with the intention of reselling it at an enhanced price. The facts of the case do not show that Tay spent money or took other steps to improve the subject land to enhance its value after he had acquired it.

Although before the subject land was transferred to Ming Huat Development Sdn. Bhd. approval of a development plan had been applied for and obtained, this was not done by Tay for himself. He as managing director made the application and obtained the approval on behalf of the company. Moreover it shows that Tay had the intention to transfer the subject land to the company even before the application was made. These facts show that the enhancement of value of the subject land, if any, was not the result of anything done by Tay for the purpose of resale.

Applying the principles enunciated in the above cases we find that Tay's dealing with the subject land was not an adventure in the nature of trade. We agree with the learned Judge of the High Court that the assessment of income tax the subject matter of this appeal should be set aside. This appeal is dismissed with costs here and in the High Court. We order that the deposit be paid to the respondent on account of costs to be taxed.

We take this opportunity to make an observation on the form of the deciding order put up by the Special Commissioners in this case. It consist of 13 pages. It was lengthy because in addition to the orders made the Special Commissioners included in it a statement of all the facts found by them and also a statement of the contentions of both parties in detail. In our opinion a deciding order should not include such statements. What should be stated in a deciding order is the decision and order to confirm or discharge the assessment or to direct that the assessment be amended and to specify the amendments, or to require the amendments to be determined by agreement between the parties, *vide* para. 26 of schedule 5 to the Act. Paragraph 37 of schedule 5 gives an indication of the idea of the legislature that a deciding order should be a distinct document setting out only the ultimate decisions and orders and that it should be separate from any other documents stating other matters. Paragraph 37 refers separately to facts found, deciding order and grounds of decision. Having regard to para. 26 and 37 of schedule 5 we are of the view that the Special Commissioners should put up grounds of decision separately from the deciding order, and the practice of putting up lengthy deciding orders in the way it was done in this case should be discontinued. In the grounds of decision they may state all the facts found by them and the contentions of the parties in detail.

Also found at [1986] 2 CLJ 402